KOW v Republic (Criminal Appeal 36 of 2020)
[2025] KECA 14 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 14 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 36 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

KOW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma (Wendo, J.) dated 23rd November, 2018 in HCCRA NO. 05 of 2018)

JUDGMENT

1. KOW, the appellant herein, was charged before the Magistrate's Court at Sirisia, with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 21st October 2014 in Bungoma county, he intentionally and unlawfully caused his penis to penetrate the vagina of SW (name withheld), a child aged 3 years.

2. The appellant pleaded not guilty to the charge, and the matter proceeded to full trial, with the prosecution calling five witnesses in support of its case. The witnesses were, PN (P) who is SW's mother; Administration Police Constable Joseph Kibii (APC Joseph) of Tulienge AP Post; Amos Nukuru a clinical officer at Sirisia Sub-County Hospital; CPL Stella Korir of Lwakhakha Police station; and Felistus Khamala a clinical officer at Sirisia Sub- County Hospital. In his defence the appellant opted to remain silent, but called his father JW as his only witness.

3. The brief facts leading to the appellant's trial, were that on the fateful day at around 6:00 am, P was in her house with SW, her 3-year-old daughter, when the girl went outside the house for a short call. P noticed that SW had taken an unduly long time outside the house, so she went out and started looking for her. While outside, she heard SW crying and she ran towards the direction of the cry. P was shocked to see the appellant, a person who was known to her as a neighbor's son, in the process of defiling SW.

P raised an alarm, and the appellant ran away while pulling up his trousers. P picked up SW and took her to Sirisia Sub County Hospital.

4. SW was examined by Felistus Khamala (Felistus), a clinical officer at the Hospital. Felistus noted that SW had a visible vaginal opening with laceration on the vaginal walls; lacerations on both the labia minora and majora; as well as visible discharge on the genitalia. She concluded that SW had been defiled. On the same day the appellant was apprehended by members of the public and handed over to Administration Police Constable Joseph Kibii (APC Joseph) of Tulienge AP Post, who re-arrested him and took him to Lwakhakha Police Station, where P had reported the matter.

5. Cpl. Stella Korir, who was assigned to investigate the matter, issued a P3 form to P. The form was filled by Amos Nukuru (Amos), another clinical officer at Sirisia Sub-County Hospital, who relying on his examination of SW and the previous notes made by Felistus, concluded that there was penile penetration of SW. Amos also examined the appellant and found that he was of sound mind, and fit to stand trial.

6. When placed on his defence, the appellant elected to remain silent, but called his father JW (W) as his only witness. W testified that the appellant has had mental problems since 2000 and had been severally treated at Kursiandet Hospital by one Dr. Makokha. W further testified that, on the night preceding the alleged incident, the appellant was screaming and disturbing neighbours, and W's efforts to hold and lock the appellant in his room were futile, as he broke open the door, and ran away.

7. In her judgment, the trial magistrate, taking into account the appellant's behavior, immediately before and after the commission of the offence, his medical history, and the fact that SW's mother acknowledged the appellant's history of mental illness, found that the appellant was legally insane at the time of the commission of the offence. Guided by the provisions of section 166 CPC, the trial magistrate made a special finding that the appellant was guilty of the offence but insane. The trial magistrate ordered the appellant to "be held at Bungoma GK Prison, while the case is refined for the order of the President"

8. The appellant who was aggrieved by the judgment of the trial magistrate, appealed to the High Court against his conviction and the order made by the trial magistrate. His appeal was dismissed, the High Court upholding the judgment of the trial magistrate on conviction, and directing that the appellant be detained at the pleasure of the President.

9. Aggrieved by the decision of the High Court, the appellant lodged the present appeal, in which his only grievance is the order made by the High Court imposing the presidential pleasure detention order against him. The appellant's main grounds of appeal are that the learned Judge of the High Court erred in upholding the order made by the trial magistrate for him to be detained at the President's pleasure, which order, he argues, was in contravention of Articles 25, 27, 28, 29 and 51 of *the Constitution*. The appellant also faults the learned Judge of the High Court for failing to take note of AOO & 6 others vs Attorney-General and another [2017] KEHC 6022(KLR), a decision of the High Court in which (Mativo J), as he then was, declared unconstitutional, orders for detention of convicted persons at the President's pleasure.

10. The appellant filed written submissions, prepared by him in person, in which he reiterated that the order of detention made against him was unconstitutional. In addition, the appellant urged the Court to consider the fact that he has been treated for his mental condition; that while in prison he has been living peacefully with other inmates; that he is reformed and rehabilitated; and has engaged in various rehabilitation-based programs. He attached a certificate in support.

11. The respondent also filed written submissions that were duly prepared by Ms. Grace Gacau, a Senior Principal Prosecution Counsel, in the office of the Director of Public Prosecution (ODPP). The main thrust of the respondent's written submissions, was that the ingredients of the offence of defilement were proved to the required standard, and that the appellant's right to a fair trial was not violated. On sentence it was submitted that the sentence that was imposed upon the appellant was within the law.

12. At the plenary hearing of the appeal, which was done through the Goto Meeting online platform, the appellant fully relied on his written submission. Ms. Mwaniki learned Senior Prosecution Counsel from the ODPP, who appeared for the respondent, opposed the appeal against conviction but conceded that the sentence was unconstitutional. When questioned by the Court, Ms Mwaniki conceded that if the appellant was of unsound mind at the time of the commission of the offence, he would not be having the necessary mens rea, and therefore the proper verdict would have been "not guilty due to insanity."

13. Having considered the record of appeal, the rival written and oral submissions that were made before us, and the law, it is apparent that the appellant is not contesting, the concurrent findings of the trial court and the High Court that he defiled SW but that he was insane at the time of the commission of the offence. The main issue for determination in this appeal is whether, the appellant's incarceration at the pleasure of the President under section 166 of the CPC is unconstitutional.

14. We take cognizant of the fact that this is a second appeal, and that in the first appeal the appellant did not directly question the legality of the order for his detention under section166 of the CPC. However, the record shows that the trial magistrate only directed that he "be held at Bungoma GK Prison, while the case is refined for the order of the President." In his appeal in the High Court the appellant questioned his conviction and the learned Judge upheld the finding that he was guilty but insane, and proceeded to order that he be held at the President's pleasure under section 166 of the CPC. This places the matter squarely within our purview, as the appeal is essentially against the order that was made by the High Court. The only matter of concern is that the specific issue regarding the legality or constitutionality of the order for detention was not addressed in the High Court. This was a lapse on the part of the High Court as in hearing the appeal the High Court as a first appellate court, had the obligation to reconsider and analyze all the evidence and the legal issues arising therefrom before coming to its own conclusion (See Okeno vs Republic [1972] EA 32). The trial magistrate having made reference to section 166 of the CPC and purported to apply the provisions therein, it was necessary for the Court to consider the legality of these provisions.

15. Moreover, in the applicant's case, the order of detention arose from the provisions of section 166 of the CPC due to his defence of insanity. Section 12 of the Penal Code provides for the defence of insanity in the following terms:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

16. In this case, it is clear that the appellant's mental illness incapacitated him from understanding what he was doing, or of knowing that he ought not to do the act he did. The trial magistrate and the High Court made concurrent findings that the appellant was insane at the time he committed the offence. This means that he had a disease of the mind that made it impossible for him to understand what he

was doing. Could the appellant, therefore, be held criminally responsible for the said act of defilement to the extent of being found guilty but insane? In arriving at their decisions both the trial court and the High Court relied on the provisions of section 166 of the CPC.

17. Section 166 of the CPC provides for the following procedure where an accused person pleads the defence of insanity:

> 1. Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.
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> 2. When a special finding is so made, the court shall report the case for the order of the president, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.
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> 3. The president may order the person to be detained in a mental hospital, prison, or other suitable place of safe custody.
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> 4. The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the president under subsection (3) shall make a report in writing to the minister for the consideration of the president in respect of the condition, history, and circumstances of the person so detained, at the expiration of a period of three years from the date of the president's order, and thereafter at the expiration of each period of two years from the date of the last report.
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> 5. On consideration of the report, the president may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the president thinks fit."
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> 6. Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Cabinet Secretary for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
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> 7. The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

18. It is evident that section 166 of the CPC grants the discretion of determining the sentence to be imposed on an accused found guilty but insane, on the President, and regardless of the circumstances of the offence or the condition of the accused, the President is the one who determines where and

under what conditions the accused serves or is finally discharged. These provisions have been a subject of interrogation by several courts.

19. In Republic v SOM [2017] eKLR, the High Court at Kisumu (Majanja, J.), having convicted an accused for the offence of murder and made a special finding under section 166(1) of the CPC to the effect that the accused committed the act of killing but was insane, and being doubtful of the constitutionality of the orders provided under section 166 of the CPC, for an accused to be kept in custody at the President's pleasure, invited the parties to address him on the issue. In Republic v S O M [2018] eKLR Majanja J having heard the parties, ruled inter alia that section 166 of the CPC providing for the vesting of discretion on the executive, on how the accused would be treated after conviction, was inimical to the fundamental duty of the Judiciary to determine the guilt of the accused and terms upon which he or she would serve the sentence; and that by vesting discretionary power on the executive and taking away the judicial function to determine the nature of the sentence to be imposed after the special finding was made, section 166 of the CPC went contrary to Article 160 of *the Constitution*, and was unconstitutional. That, in addition, it violated the right to a fair trial as protected under article 25 of *the Constitution*. Consequently, the High Court considering the circumstances of the offence, its gravity and the mental state of the accused, ordered him to be committed to a mental institution namely Mathari Mental Hospital for a term of fifteen (15) years subject to periodic review by the Court in accordance with section 166 of the CPC and in any case before the expiry of every two (2) years.

20. In Wakesho vs. Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR (delivered on 3rd December 2021), this Court (Gatembu Kairu, Mbogholi Msagha, and Nyamweya JJ A.), in reference to section 166 of the CPC rendered themselves as follows:

> " 56. It is clear from the few decisions of the High Court we have sampled that judicial opinion is divided on the constitutionality of some of the provisions of section 166 CPC. As we have mentioned, beyond passing reference, counsel did not address us on this issue which certainly requires to be fully canvassed. It is a matter on which the state of the law is clearly unsatisfactory and in dire need of reform and the Attorney General should take immediate steps to initiate reform.
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> 57. We can only add our voice to the many on the reforms that are needed to the provisions of section 166 CPC in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.
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> 58. Second, the subs-stratum of the provisions as regards the right to fair trial in criminal cases in Article 50(2) of *the Constitution* is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further

still to be convicted on the basis of such a trial as is provided for in section 166 of the Criminal Procedure Act, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the Court send a copy of this judgment for the attention of the Attorney General. Enough said on that.

57. For purposes of the present appeal, however, we are satisfied that the learned Judge ought to have made a special finding of guilty but insane. We therefore allow the appeal. We quash the conviction and set aside the sentence of death. We substitute therefor, a special finding that the appellant did the act charged but he was insane at the time he did it. We order that the appellant, who has been in custody since his arrest on 18th May 2012, shall immediately be taken to a mental hospital for medical treatment where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself."

21. Similarly, in PKI v Republic (Criminal Appeal 37 of 2022) [2023] KECA 1218 (KLR) (6 October 2023) (Judgment) this Court (Makhandia, ole Kantai & Gachoka JJ A.), noted as follows:

"49. The Judge in the case leading to this appeal entered a special finding under Section 166(1) CPC to the effect that the appellant was guilty but insane. She ordered that the appellant be held at the pleasure of the President and that the proceedings and Judgment be placed before the Cabinet Secretary, Ministry of Interior, and National Coordination for reporting to the President for his consideration. We have found in this Judgment that it is the duty of the Judiciary to impose sentences on accused persons who are convicted after being tried in criminal trials. Such convicted persons are entitled to know with certainty the sentence that they are to serve after conviction. Sentencing such persons to indeterminate sentences at the pleasure of the President robs the Judiciary of its constitutional role of imposing definite sentences to convicted persons. We think that it was wrong to sentence the appellant to an undetermined period of imprisonment. To that extent only does this appeal succeed. The appeal on conviction fails and is dismissed.

50. What, then, is the appropriate sentence?

51. The appellant, upon conviction, in mitigation stated that he was 57 years old; was sickly having been diagnosed HIV positive, and was diabetic and hypertensive. He suffered mental problems which he had lived with for several years. His wife had died while he was in custody and had 3 children, some in school. He had been in custody for 8 years (sentence was imposed on 28th March, 2019) and was remorseful and regretted what had happened to his daughter.

52. State Counsel informed the trial Court that the appellant was a first offender.

53. We have considered all the circumstances of the case and mitigation offered by the appellant in the case. Having done so we think that an appropriate sentence in the case is imprisonment for a period of twenty-five (25) years"

22. From the afore mentioned decisions, it is clear that both the High Court and this Court has expressed its dissatisfaction with section 166 of the CPC, in particular the discretion given to the President in regard to sentencing where an accused is found to have committed the offence when he/she is mentally incapable of forming the necessary mens rea and, therefore, incapable under section 12 of the Penal Code of being held criminally responsible. We reiterate what was stated in Wakesho vs. Republic, that it is a legal paradox to find a person who has been found mentally incapable "through a disease affecting his mind making him incapable of understanding what he is doing or knowing that he ought not to do that act," guilty but insane, as it is evident that he has not met the threshold as provided under section 12 of the Penal Code for being held criminally responsible.

23. We note that AOO vs Attorney- General (supra) which was relied upon by the appellant is distinguishable from the appellant's case. This is because in AOO vs Attorney- General the High Court was addressing orders for detention at the pleasure of the President under section 25(2) of the Penal Code which provides for detention of minors convicted of murder, hence the holding by the High Court that imprisonment at the President's pleasure for an indeterminate period, dependent on the executive's discretion, did not conform with the requirements of Article 53(1)(f) of *the Constitution*. It is instructive that Article 53(1)(f) of *the Constitution* provides that every child has the right not to be detained except as a measure of last resort, and when detained, to be held for the shortest appropriate period, separate from adults and in conditions that take account of the child's sex and age. The appellant was according to his father's evidence 30 years old as at the time of the commission of the offence, and therefore Article 53 of *the Constitution* is not applicable to him. Nevertheless, we are in agreement with the general principle espoused by Mativo J in AOO vs Attorney- General regarding the vesting of judicial powers upon the executive being contrary to the doctrine of separation of powers, and would agree that just as the powers vested under section 25 of the Penal Code, the powers vested under section 166 of the CPC is unconstitutional.

24. The need for legal reforms with regard to how matters involving persons who are mentally disabled are dealt with in criminal trials, has been reiterated by both the High Court and this Court as seen from the decisions that we have cited above. Both Courts concur on the unconstitutionality of the provisions in section 166 in regard to the powers given to the President to order detention of convicts found to have been mentally disabled at the time of the commission of the offence or during trial.

25. The action of the appellant of defiling an innocent 3-year-old child was atrocious and reprehensible, but the fact is that he was not criminally responsible for his actions due to his insanity. For this reason, we allow the appeal to the extent of setting aside the order of guilty but insane, and substituting thereto an order, that the appellant is not guilty by reason of insanity. Consequently, we order that the appellant be treated for his mental illness, and he be produced before the trial court within six months for confirmation of his current mental status, and an order shall thereafter be made if he is well, for his release, or if he is still unwell for his treatment. The provisions of the *Mental Health Act* Chapter 248 may be applied subject to a social inquiry report and a supporter or representative being identified.

Those shall be the orders of this Court.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR